No. 85-1170

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

CLARENCE RAPPLEYEA,

Intervenor-Appellant,

against

MARIO CUOMO, *et al.*,

Defendants-Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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Question Presented

Assuming that a claim of political gerrymandering is justiciable, is a substantial federal question presented where three lower courts have found that the pleadings and proof are factually inadequate to establish invidious partisan discrimination?

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MOTION TO DISMISS OR AFFIRM

Appellees[1] Mario Cuomo, Stanley Fink and Melvin Miller jointly move pursuant to Rule 16 to dismiss or affirm on the ground that this appeal fails to present a substantial federal question, even if this Court holds in *Davis* v. *Bandemer*, No. 84-1244 (argued 10/7/85) that a claim of partisan gerrymanding is justiciable.

1. Mario Cuomo, who succeeded Hugh L. Carey as Governor of the State of New York, is substituted in the place of the former governor as a party-appellee. Appellee Fink remains the Speaker of the Assembly of the State of New York and Appellee Miller, an Assemblyman, was Co-Chair of the Legislative Task Force on Reapportionment. Only Intervenor-Rappleyea has docketed an appeal in this Court. Plaintiffs Bay Ridge Community Council, Inc., *et al.* never appealed to the Court of Appeals and petitioner Bernard LeBlanc's appeal thereto was dismissed for want of prosecution.

Statement of the Case

Appellees adopt the facts set forth in the opinions below (J.S. App. 2, 11).[2] This action is consolidated from three separate proceedings filed by Bay Ridge Community Council, Inc., Bernard J. LeBlanc and Robert P. Whelan ("plaintiffs"), respectively. Clarence P. Rappleyea ("Intervenor"), the Minority Leader of the State Assembly, did not intervene in this case until after the record was developed and the trial court had granted appellees' motions for summary judgment. Intervenor intervened at the intermediate appellate stage of these proceedings, but failed to file an intervention pleading (CPLR 1014), or motions to vacate the judgment of the trial court or to reopen the record.[3] Therefore, Intervenor is bound by the record developed and claims asserted by the plaintiffs. *Cf. Martin* v. *Ronan,* 47 N.Y.2d 486, 419 N.Y.S.2d 42, 392 N.E.2d 1226 (1979); *see also Garrity* v. *Gallen,* 697 F.2d 452, 457-458 (1st Cir. 1983); *Petition of Geisser,* 554 F.2d 698, 705 n.6 (5th Cir. 1977).

Specifically, the pleadings of plaintiff Bay Ridge Community Council, Inc. advanced no federal claim whatsoever, but relied solely on Article III of the New York Constitution (SR 96-107).[4] Robert Whelan's petition averred only

2. References to J.S. App. are to the appendix attached to the Jurisdictional Statement filed by Intervenor.

3. One copy of Intervenor's affidavit in support of his motion to intervene, not included in the State Record, is lodged herewith.

4. References to "SR" denote citations to the Record used in the State Court of Appeals, one copy of which is lodged herewith. The Court of Appeals, by Order dated September 11, 1985, granted Intervenor's motion to supplement the record with the maps now lodged with this Court *only to the extent* of permitting reference thereto at oral argument.

that the reapportionment statute "is a 'gerrymander' and in violation of the United States Constitution, 14th Amendment, Section 1" (SR 373); and the petition of Bernard J. LeBlanc merely alleged, "Upon information and belief, the assembly districting plan contained in Chapter 111 of the Laws of 1982, as Amended has been designed to maximize the political power of a particular party." (SR 137-138). However, neither Whelan's nor LeBlanc's petition identified any facts in support of their federal claim (SR 138, 373).

The plaintiffs chose to bring expedited motions for a preliminary injunction to block implementation of the reapportionment statute (SR 81, 124, 347). In response, appellees noticed motions for summary judgment to dismiss all the claims raised by the plaintiffs (SR 143). Appellees' motions were supported by the lengthy and detailed affidavit of Assemblyman Miller (SR 145-178) which explained each of the various entirely neutral factors influencing the drawing of the districts challenged by plaintiffs, such as topography and the mandatory "block or border" and "town or border" rules of the State constitution.[5] Assemblyman Miller also described the impact of the population equality strictures set forth in this Court's opinion in *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964), and followed in *Matter of Schneider*, 31 N.Y.2d 420, 340 N.Y.S.2d 889, 293 N.E.2d 67 (1972), where the Court of Appeals rejected a similar claim of partisan gerrymandering as to the prior redistricting statute. Primarily addressing New York City districts, Assemblyman Miller discussed the effect of the

5. Article III, § 5 of the New York Constitution requires that any towns and blocks which can be included in either of two adjoining Assembly districts shall be so placed as to make districts most nearly equal in numbers of inhabitants.

Voting Rights Act's requirement prohibiting a redistricting plan from diluting the voting strength of racial minorities.[6] In response to appellees' motions, the plaintiffs submitted no opposition papers but relied solely upon their original pleadings.

The trial and appellate courts considered and rejected plaintiffs' federal claim. Contrary to Intervenor's mischaracterization of the decisions below, none of the state courts relied solely upon the ground that partisan gerrymanding claims are non-justiciable. Rather, adopting a clear alternate holding, the trial and intermediate appellate courts assumed for the purposes of argument that plaintiffs' gerrymandering claim was justiciable, but concluded that the plaintiffs had utterly failed to adduce any proof that the statute was enacted with an invidiously discriminatory purpose or that it effectuates partisan discrimination (J.S. App. 1, 6, 8, 19).

It is from this judgment that Intervenor appeals.

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6. Since 1974, the counties of New York, Bronx and Kings have been covered jurisdictions subject to the pre-clearance requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. See *United Jewish Organizations of Williamsburg* v. *Carey*, 430 U.S. 144, 148-149 (1974). At the time the instant reapportionment statute was being considered in the Legislature, both the Justice Department and a three-judge federal court were reviewing the Legislature's compliance with the Voting Rights Act. *See Flanteau* v. *Anderson*, 537 F.Supp. 257 (S.D.N.Y. 1982) (three-judge court) *app. dism.* 458 U.S. 1123 (1982). On June 22, 1982, the United States Attorney General interposed objections to the reapportionment plan initially enacted in 1982 N.Y. Laws, Ch. 111. Subsequently, the Legislature amended the statute to meet those objections, 1982 N.Y. Laws, Ch. 455, and the Attorney General pre-cleared the statute on July 4, 1982. The amended statute made no changes in the districts challenged by plaintiffs and Intervenor in the consolidated proceedings that led to this appeal, but the original judgment was resettled in order to declare Chapter 455 constitutional in all respects (SR 35-42, 60.1-62).

ARGUMENT

This appeal does not present a substantial federal question, even assuming it presents a justiciable issue.

Appellees urge the Court to summarily dismiss this appeal or affirm the judgment below on the ground that the plaintiffs' abject failure to establish a *prima facie* case of partisan gerrymandering renders this appeal so insubstantial as not to require further briefing or argument. This appeal presents no novel or substantial question of federal law.[7] Intervenor primarily seeks to reverse the state courts' findings on motions for summary judgment even though the original plaintiffs did not articulate evidentiary facts in their pleading or challenge the detailed affidavit supporting appellees' motions for summary judgment. In rejecting the political gerrymander claim on sufficiency of the evidence grounds the state courts invoked longstanding and legitimate rules of procedure designed to dispose summarily of insubstantial claims. *See, e.g. Zuckerman* v. *City of New York*, 49 N.Y.2d 557, 427 N.Y.S. 2d 593, 404 N.E.2d 718 (1980); *Shapiro* v. *Health Insurance Plan For Greater New York*, 7 N.Y.2d 56, 194 N.Y.S.2d 509, 163 N.E.2d 333 (1959) (party seeking to defeat summary judgment must proffer admissible evidence to demonstrate genuine triable issue and cannot rely on mere conclusory and unsubstantiated allegations); *see* Fed. R. Civ. Pro.

7. The Response of Appellee, Robert P. Whelan, to the Jurisdictional Statement presents solely a question of state law on the applicability of Article V, § 4 of the New York Constitution. As such it is beyond the jurisdiction of this Court. *Twentieth Century Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

56(e). Hence, the material facts essentially were uncontroverted, and the trial court's conclusion that those facts were inadequate to sustain a claim of partisan political gerrymandering was unanimously affirmed by two appellate courts. Under these circumstances, this Court should not note probable jurisdiction to examine either the lower courts' factual findings or their assessment of the sufficiency of the evidence. *See generally Rogers* v. *Lodge*, 458 U.S. 613, 622-23 (1982); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

In any event, the record clearly establishes that plaintiffs failed to establish a *prima facie* case of partisan political gerrymandering. No decision of this Court has recognized charges of partisan gerrymandering as stating a justiciable federal cause of action.[8] However, Justice Stevens in a concurring opinion, in *Karcher* v. *Daggett*, 462 U.S. 725, 744, 754-55 (1983), proposed several elements for a *prima facie* case of partisan gerrymandering, emphasizing that even then the burden of proof on a plaintiff would be heavy. A plaintiff must show: (1) that he is a member of an identifiable political group whose voting strength has been diluted by the challenged redistricting scheme; and (2) objective evidence of irregularity, *i.e.*, oddly shaped districts, a departure from standard procedure during enactment of the districting process or extensive deviation from established political boundaries.

8. *Davis* v. *Bandemer*, No. 84-1244 was argued before this Court on October 7, 1985. In that case a majority of a three-judge court invalidated a reapportionment of the Indiana Legislature for partisian gerrymandering. *Bandemer* v. *Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984) *prob. juris. noted* —— U.S. ——, 105 S.Ct. 1840 (1985). We demonstrate below, *infra* at 8, that this case is wholly distinguishable from *Davis* v. *Bandemer*.

Even if the complainant establishes a *prima facie* case, the districting scheme "will nevertheless be constitutionally valid if the State can demonstrate that the plan as a whole embodies acceptable, neutral objectives." *Id.* at 760

Specifically relying upon these standards, the intermediate state appellate court, held that the plaintiffs had failed to establish a *prima facie* case of partisan gerrymandering (J.S. App. 7). The court emphasized plaintiffs' failure to produce sufficient evidence of a partisan intent or alternative districting plans that would provide for both more compact districts and greater population equality. *Id.* Moreover, as we demonstrated earlier, plaintiffs failed to produce any evidence which even arguably suggests that the voting strength of an identifiable political group had been diluted or that procedural irregularity infected the challenged enactment. As noted, Intervenor was content to rest on the original plaintiffs' pleadings and proof.

Conversely, the record establishes that the redistricting plan as a whole embodies acceptable, neutral objectives. Assemblyman Miller's affidavit addressed with specificity plaintiffs' challenges to the statute and explained the numerous neutral criteria which necessitated the challenged districts and the plan as a whole. These factors include: topography; "block or border" and "town or border" rules of Article III, § 5 of the State Constitution; Voting Rights Act requirements, and the population equality requirement (SR 145-178). In fact, neither Intervenor

nor plaintiffs ever disputed the factual allegations in Assemblyman Miller's affidavit. Accordingly, even if this Court reweighs the sufficiency of the evidence, the record amply establishes that New York's redistricting plan is constitutional.

Thus, this case stands in sharp factual contrast to *Davis* v. *Bandemer, infra* where the Court noted probable jurisdiction apparently to consider whether a charge of political gerrymandering constitutes a justiciable federal claim. Of course, if this Court reverses the district court's holding in *Bandemer* on the ground that political gerrymandering claims are non-justiciable, this appeal would be foreclosed.

Because of the significant factual difference between this case and *Bandemer,* summary dismissal or affirmance is appropriate here in any event. In contrast to *Bandemer,* the uncontroverted facts overwhelmingly support a finding that the redistricting scheme was adopted for non-discriminatory reasons. In *Bandemer,* the district court found Indiana's use of inconsistent and unexplained multi-member districts was evidence of partisan discriminatory intent while in this case no multi-member districts exist. Contrary to *Bandemer,* New York's redistricting scheme was enacted through the efforts of the leading members of the parties and had the approval of virtually every Republican in the State Senate and more than one-quarter of the Republicans in the Assembly. (See Assembly Journal, July 1, 1982 at 2236; Senate Journal, July 1, 1982 at 303.) Indeed, the single highest ranking Republican in the Legislature, defendant Anderson, Senate Majority

leader, joined with appellees in seeking the dismissal of the Bay Ridge plaintiffs' complaint which alleged that appellees had violated State constitutional guarantees for political ends. (SR 118-132) Finally, all of the courts below rejected Intervenor's attack on the statute based on the anti-gerrymandering provisions in Article III, § 5 of the State constitution which requires districts to be as compact and convenient as possible. (J.S. App. 1, 5-6, 14-16)

Intervenor's policy and legal arguments also lack merit. Indifferent to the teaching of *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), and lacking any concrete evidence of intentional discrimination, appellant must rely on the flawed thesis that party registration or prior voting patterns should dictate future election results, and that the ultimate winners of elections must be in lockstep harmony with such statistical data. If not, according to Intervenor, the cause of the disharmony is *ipso facto* political gerrymandering. In effect, Intervenor argues that the number of votes obtained by Republican party candidates statewide and countywide should translate into a proportionately equal number of Republican seats in the New York State Assembly. This Court however "has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation." *City of Mobile* v. *Bolden*, 446 U.S. 55, 79 (1980); *see also White* v. *Regester*, 412 U.S. 755, 765-66 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124, 149, 156-57, 160 (1971).

Furthermore, Article III, § 5 of the New York State Constitution mandates a winner-takes-all, single-member district election system. Such a system makes impossible any accurate correlation between the percentage of state-

wide or countywide votes for a particular party and the number of seats actually won in a legislative body. Proportionality requirements are utterly inconsistent with New York's electoral system in which state legislators represent single districts. *See Whitcomb* v. *Chavis*, 403 U.S. 124, 153 (1970): ("[T]ypical American legislative elections are district-oriented, head-on races between candidates of two or more parties.").

Contrary to Intervenor's suggestions political considerations in a districting plan do not automatically render it illegal. Even the legal commentators relied upon by Justice Stevens in *Karcher* v. *Daggett* agree that political considerations are a legitimate part of the redistricting process and that some vote dilution will inevitably result from residential patterns. Professor Engstrom has noted:

> The essential problem is that any districting system, when combined with winner-take-all elections, is discriminatory to some extent because some vote dilution will inevitably result from the residential dispersion or concentration of a group's voting strength.

Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 2 Ariz. St. L. J. 277, 282 (1976).

Justice Stevens, in his concurring opinion in *Karcher*, recognized that some "vote dilution" will inevitably result from "residential patterns" where one party is heavily concentrated in the urban areas (as in New York). 462 U.S. at 760 n.27. The source Justice Stevens cited, Backstrom, Robins & Eller, *Issues in Gerrymandering: An*

Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1127 (1978), expands upon this point:

> Aside from those analysts who emphasize physical appearance as a means of identifying gerrymandering, others purport to measure gerrymandering by focusing on the partisan outcome of the legislative election following a redistricting. Analysts using this approach compare the percentage of a party's legislative vote statewide with a percentage of seats gained. Marked disparities between the two figures are said to indicate the existence of a gerrymander.
>
> This method of identifying gerrymandering, like the first, has major flaws. First, the approach fails to account for the fact that the difference between percentage of vote and number of seats captured may in fact be the result of natural advantages—the inordinate concentration of partisans in one place—rather than any deliberate partisan districting scheme.

Moreover, Intervenor simplistically assumes that voters cast ballots strictly on the basis of party affiliation. That assumption ignores the increasing importance of incumbency, media advertising, and the tendency towards "ticket-splitting" throughout the electorate.[9]

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9. For example, in Richmond County two of three Assemblymen are Democrats, but the State Senator and the United States Representative for those districts are Republicans, and in the remaining Assembly District, represented by a Republican, 61% of enrolled voters are Democrats. Because of the continuing decline of political parties and the rise of independent voters, political scientists have recently noted the difficulty in trying to predict election outcomes based on party affiliation. *See* Asher, "Voting Behavior Research in the 1980's: An Examination of Some Old and New Problem Areas," in *Political Science: The State of the Discipline* 339 (A. Finifter ed. 1983); *see also* Niemi and Deegan, Jr., *A Theory of*

(footnote continued on next page)

Interestingly enough, even if Intervenor's methodology were more sound, the statewide statistics on party enrollment would still undermine his claim. As of April 1984, 58.8 percent of the registered voters were enrolled as Democrats and 41.2 percent as Republicans. In the current Legislature, Democrats compose 56.9 percent of all seats and Republicans 43.1 percent—a close correlation in statistics.

In 1978, under Assembly District lines enacted when the Republican Party controlled both houses of the state legislature as well as the Governor's office, the Democratic party received a total of seats 8.1 percent above its statewide vote for the Assembly. Under the present plan, that disproportion has been reduced to 7.1 percent based on the statewide Assembly vote in 1984.

Perhaps the most telling statistical blow to Intervenor's thesis can be seen in the 1984 Assembly results in Kings County, one of the counties whose districts were under

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Political Districting, 72 Am. Pol. Sci. Rev. (No. 4) 1304 (1978); Norman H. Nie, Sidney Verba and John R. Petocik, *The Changing American Voter* (1976); Gerald Pomper, *Voter's Choice* (1975).

Another example is provided by the results of the 1972 Assembly reapportionment. In 1972, both houses of the Legislature were controlled by the Republicans and the Governor was a Republican as well. In *Schneider* v. *Rockefeller, supra,* the claim of partisan gerrymander was made using the same votes-to-seats analysis that Intervenor asserts. In 1974, the Democrats won a majority of the Assembly, notwithstanding their claim in *Schneider* that the 1972 plan was an unconstitutional gerrymander, and subsequent voting results dramatically differed from what was predicted. As Professor Scarrow observes: "[A]nyone looking at the pattern of bias reflected in the 1976 and 1978 elections would conclude that the Democrats, not the Republicans, had designed the system." H. Scarrow, *The Impact of Reapportionment on Party Representation in the State of New York*, Pol. Stud. J. 937, 943 (1981).

challenge in this case. In 1980, just prior to the present reapportionment, there was one Republican Assemblyman out of twenty-two in Kings County. In 1984, after the challenged reapportionment, there is one Republican Assemblyman out of eighteen in the Assembly. Thus, the Republican party has a greater percentage of Assemblymen in Kings County now than it had before the challenged reapportionment, because only Democrats lost their seats to meet the population equality mandates of *WMCA* v. *Lomenzo, supra.*

In sum, Intervenor, a Republican, claims partisan gerrymandering infects a redistricting statute introduced in the State Senate by the Republican majority leader, and approved by almost every Republican senator and more than one-quarter of Intervenor's Republican colleagues in the Assembly. He asks this Court to invalidate a statute upheld against both federal and state constitutional claims of gerrymandering by all eleven judges below, who were appointed by Governors of both political parties. He rests his claim on flawed use of irrelevant statistics instead of a single datum of record evidence demonstrating invidious discrimination. In short, Intervenor has failed to present a substantial federal question meriting review by this Court.

CONCLUSION

For the foregoing reasons, appellees' motion to dismiss or affirm should be granted because this appeal fails to present a substantial federal question.

Dated: New York, New York
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